LIM KIM POH

v.

PP

HIGH COURT MALAYA, SHAH ALAM
KANG HWEE GEE J
[CRIMINAL APPLICATION NO: 44-1-2000]
22 MARCH 2000

CRIMINAL PROCEDURE: *Charge - Defective charge - Effect of - Irregularity - Whether legality of charge affected - Criminal Procedure Code, s. 156*

CRIMINAL PROCEDURE: *Plea of guilty - Unequivocal plea - Whether accused understood nature and consequences of plea - Whether accused induced into pleading guilty*

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - When appellate court to interfere - Whether sentence illegal or unsuitable - Whether trial judge erred in failing to consider relevant factors - Whether trial judge erred in considering irrelevant factors*

CRIMINAL PROCEDURE: *Sentence - Binding over - Whether binding over should have been ordered - Circumstances in which binding over to be ordered - Criminal Procedure Code, ss. 173A, 294*

The appellant was charged jointly with another accused before the Sessions Court with the offence of committing armed gang-robbery under ss. 395 and 397 of the Penal Code. He pleaded guilty to the charge and was sentenced to a term of imprisonment of six years and five strokes of the rotan.

Among the grounds raised in this appeal were: (i) that the appellant had been induced to change his plea from not guilty to guilty and that he pleaded guilty not having understood the nature and consequence of his plea; (ii) that the Sessions Court judge ought to have bound over the appellant under either ss. 173A or 294 of the Criminal Procedure Code ('the CPC') considering that the appellant was a first offender, young and the passive part he played in the robbery, the favourable probation report submitted and the fact that he had pleaded guilty saved time and costs; and (iii) that the sentence imposed by the Sessions Court judge was nevertheless too high thereby giving rise to the inference that he had failed to: (a) consider the mitigation plea of the

appellant; (b) make an accurate assessment of fact and law with respect to public interest; and (c) consider the probation report the authorities submitted and to apply the correct sentencing principles on youthful offenders.

A subsequent issue which arose concerned the legality of the charge in that it included s. 34 of the Penal Code despite the fact that a charge of gang-robbery under s. 395 of the Penal Code need not be read with s. 34 of the Penal Code.

Held:

[1] At the time the appellant pleaded guilty, he was properly represented by counsel. An open-ended submission without more, that the appellant must have been induced into pleading guilty merely from the fact that he had all along claimed trial cannot be accepted.

[2] Before s. 294 of the CPC applies, certain conditions need to be satisfied, namely: (i) that an adult offender must have been convicted for an offence punishable with imprisonment; (ii) that it must appear to the court, regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed, that it is expedient that the offender be released on probation of good conduct.

[2a] The provisions of s. 294 of the CPC do not allow any court to go to the length of saying that in every case of a first offender, the antecedents of the convicted person are necessarily such as to make it expedient to bind him over. Each individual case must be considered on its own merits and must be examined with a view to ascertaining whether, having regard to any matters mentioned in s. 294, binding over is in all the circumstances of the case expedient.

[2b] The facts of the case disclosed that the appellant was twenty when he committed the offence and this was well past the age of criminal responsibility. He was not a first offender considering that he had also committed the same offence in the other two charges. There were also no extenuating circumstances that led him to commit the present offence. Moreover all the probation report showed, amongst others, the fact that he had come from a

reasonably decent family and that he had regretted having committed the offence. There was hardly any material of substance for the Sessions Court judge to consider not to impose the sentence of imprisonment and whipping and to act under ss. 173A and 294 of the CPC instead.

[3] It is an established principle that an appellate court should be slow to interfere or disturb a sentence passed by the trial court unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. The mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the trial court applies the correct principles in the assessment of the sentence.

[3a] The appellate court therefore will not interfere unless it is satisfied that: (i) the sentencing judge had made the wrong decision as to the proper factual basis for sentence; (ii) the sentencing judge had erred in appreciating the materials placed before him; (iii) the sentencing judge had passed a sentence which is wrong in principle; and (iv) that the sentencing judge had imposed a sentence which was manifestly excessive.

[3b] The grounds of decision of the Sessions Court judge indicate that he had, in the plea of mitigation given due consideration to the probation report, the fact that the appellant had pleaded guilty, and that the appellant was twenty years old when the offence was committed and the plea in mitigation.

[3c] The sentence of six years imprisonment and five strokes of the rotan imposed by the judge would not, under the circumstances, be excessive and therefore should not be disturbed.

[4] Based on s. 156 of the CPC, the irregularity in the charge should not affect its legality as it was clear that the appellant could not have been misled by the redundant use of s. 34 of the Penal Code.

[Appeal dismissed.]

Case(s) referred to:
Tan Koon Swan v. PP [1987] 1 CLJ 511 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 156, 171A, 173A, 294
Penal Code, ss. 34, 39, 391, 395, 397

Other source(s) referred to:
Mallal's Criminal Procedure, 1998, 5th edn

For the appellant - En Christopher
For the counsel - Zakaria Merican Ishak Merican DPP

Reported by Mariette Peters-Goh

JUDGMENT

Kang Hwee Gee J:

The appellant was charged jointly with another accused before the Session Court with the offence of committing armed gang-robbery with three other persons still at large contrary to s. 395 read with s. 397 of the Penal Code.

The charge read as follows:

> Bahawa kamu bersama tiga lagi saspek yang rnasih bebas pada 25.12.97 jam lebih kurang 2005 hrs di alamat No. 63, Jalan Merpati Taman Setia Jaya, Banting dalam daerah Kuala Langat di negeri Selangor dengan niat bersama didapati telah melakukan kesalahan rompak berkawan dan bersenjata terhadap seorang lelaki Cina nama Tan Fong Wui K/P 740911-10-5473 dan telah merompak barang kemas lebih kurang RM50,000/- dan semasa melakukan rompakan tersebut kamu telah menggunakan senjata pisau. Oleh itu kamu telah melakukan satu kesalahan di bawah sek. 395/397 kanun keseksaan di baca bersama sek. 34 undang-undang yang sama.

He pleaded guilty to the charge and was sentenced to a term of imprisonment of six years and five strokes of the rotan.

The Sessions Judge in passing the sentence took into consideration two other outstanding offences of robbery (in cases SA1 62-5-98 and SA1 62-7-98) committed by the appellant which was pending trial in the same court under s. 171A of the Criminal Procedure Code.

The facts of the case was given as follows:

> Pada 25.12.97 jam 8.15 malam pengadu semasa bertugas di bilik gerakan IPD Kuala Langat telah menerima satu panggilan talipon mengatakan ada satu kejadian samun berlaku di sebuah rumah di No. 63, Jalan Merpati, Taman Setia Jaya, Banting.
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> Bertindak di atas maklumat tersebut pihak polis telah melakukan satu serbuan ke rumah tersebut. Polis telah berjaya menahan tertuduh bersama seorang rakannya yang lain. Dalam tangkapan tersebut, pihak polis telah berjaya menemui semula barang-barang berikut:
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> 1) lapan bentuk cincin;
> 2) Wang tunai RM460;
> 3) US Dollar 180;
> 4) satu besi kuku kambing;
> 5) satu plier;
> 6) satu ikat anak kunci;
> 7) satu handphone; dan
> 8) satu topi.
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> Siasatan telah dijalankan setelah dibuat pengecaman ke atas barang-barang yang dijumpai pada milik tertuduh dan rakannya. Mangsa telah mengatakan bahawa barang-barang tersebut adalah kepunyaan mereka dan telah disamun oleh tertuduh dan rakannya.
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> Mengikut keterangan mangsa kejadian itu berlaku pada 25.12.97 jam lebih kurang 8.00 malam di alamat No.63, Jalan Merpati, Taman Setia Jaya, Banting. Semasa kejadian tersebut, mangsa bersama dua pembantu rumah berada di dalam rumah. Tiba-tiba masuk lima orang lelaki Cina dari arah pintu belakang. Semua lelaki tersebut bersenjatakan pisau. Setelah mengikat magsa-mangsa, mereka memasukkan mangsa-mangsa ke dalam sebuah bilik dan mengunci. Penjenayah telah menggeledah rumah dan melarikan barang-barang kemas dan barang berharga.

The grounds as amended in the petition were not properly organised. But in so far as they can be understood may be summarised as follows:

1. The appellant had been induced (didorong) to change his plea from not guilty to guilty. He had pleaded guilty in the hope of being bound over for the offence he had committed and had not understood the nature and consequence of his plea. This is evident from the notes of evidence which shows that he had pleaded guilty only after a few adjournments.

2. The Sessions Court judge ought to have bound over the appellant under either s. 173A or s. 294 of the Criminal Procedure Code considering that the appellant was a first offender, young age of the appellant, the passive part played by him in the robbery, the favourable probation report submitted, and the fact that he had

pleaded guilty thereby saving much time and costs and had regretted what he had done.

3. He had come to the wrong conclusion that:

   (i) the victim was put in danger by the use of offensive weapons as no weapons was recovered from the scene, and

   (ii) the value of the property involved in respect of each charge was RM50,000, RM150,000 and 28,000 respectively whereas the amount recovered at the scene in this charge was much less.

4. The sentence imposed by the Sessions Judge was nevertheless too high thereby giving rise to the inference that he had failed to properly:

   (i) consider the mitigation plea of the appellant,

   (ii) make an inaccurate assessment of fact and law with respect to public interest, and

   (iii) consider the probation report, the authorities submitted and to apply the correct sentencing principle on youthful offenders.

Rulings

Having considered the grounds and the submissions of counsel for the appellant and the deputy public prosecutor, my rulings are as follows:

1. Being Induced To Plead Guilty – Expectation Of Being Bound Over

A perusal of the notes recorded by the Sessions Court judge discloses that the appellant had pleaded guilty after the charge had been read and explained to him by the Court and that he had understood the nature and consequence of his plea – and at the time when he made the plea he was properly represented by counsel.

In all fairness I do not think one can accept the open ended submission without more that the appellant must have been induced into pleading guilty merely from the fact that he had all along claimed trial and therefore must have been induced into pleading guilty and that he would not have changed his plea had he not been induced into thinking he would be bound over.

The submission raises the question of who induced him and in what manner was he induced.

2. Binding Over Under Section 173A Or Section 294 Of The Criminal Procedure Code

Principles Governing Binding Over An Offender –

See the following commentaries in *Mallal Criminal Procedure*, 5th edn, 1998:

> [9626] Before s. 294 will apply, certain conditions need to be satisfied. Firstly an adult offender must have been convicted for an offence punishable with imprisonment. Secondly it must appear to the court, regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed, that it is expedient that the offender be released on probation of good conduct. Section 294 may be invoked in the case of an offender who was a youthful offender at the time of commission of offence but has since ceased to be one at the time of sentencing or appeal.
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> [9628] The provisions of section 294 CPC do not allow any court to go to the length of saying that in every case of a first offender the antecedents of the convicted person are necessarily such as to make it expedient to bind him over. Each individual case must be considered on its own merits and must be examined with a view to ascertaining whether, having regard to any of the matters mentioned in section 294, binding over is in all the circumstances of the case expedient.
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> [9629] Where a person has been convicted the court may release him on bond, having regard to 'extenuating circumstances under' which the offence was committed. It appears that extenuating circumstances may be deduced from the facts of the case itself. In *Tan Tek Seng @ Tan Chee Meng v. PP* [1990] 2 CLJ 103 the appellant was charged with two counts of CBT under section 409 of money belonging to the Jabatan Pelajaran Johor. He was convicted of both counts and sentenced to 6 months imprisonment in respect of each charge. On appeal to the High Court, Richard Tallala JC found that the appellant had acted out of 'sheer stubbornness and cussedness'. According to the learned judicial commissioner:
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> > He took the money, not stealthily, but openly, in the presence of the clerk in the school office. He did not spend the money but kept it in his house. He eventually returned it to the department in full. Unfortunately he told a lie in answer to the request for

payment and kept the money too long. I do not see much criminality in the appellant's action or more appropriately 1 should say the offences were committed under extenuating circumstances.

Thus the conviction and sentence was set aside and the appellant was discharged conditionally upon his entering into a bond of RM5,000 without sureties under s. 173A CPC. In *PP v. Fam Kim Hock* the fact that the manager's son had almost instructed the offender to commit irregularities was taken into account by the court when binding over the offender under s. 294 CPC.

Question: Is It Expedient To Bind Over The Appellant?

The appellant was aged twenty when he committed the offence – well past the age of criminal responsibility. He was not a first offender considering that he had also committed the same offence in the other two charges. There was also no extenuating circumstances that led him to commit the present offence and the two offences that had been taken into consideration by the Sessions Court.

All that the probation report showed was the fact that he had come from a reasonably decent family, that he had left school at the mid-secondary level, that he had been employed as a car repairer with a salary of RM800 per month and that he had regretted for having committed the offence. There was hardly any material of substance for the Sessions Court to consider not to impose the sentence of imprisonment and whipping by law required and to act under s. 173A or s. 294 of the Criminal Procedure Code instead.

Committing the offence of armed gang-robbery at night in the home of a law-abiding citizen is a sufficiently grave act that requires the Sessions Court to place public interest above all other personal considerations of the appellant.

The Session Court judge was therefore justified to have rejected the plea that the appellant be bound over under s. 173A or s. 294 of the Criminal Procedure Code.

The Conclusions Made By The Sessions Court Judge

1. The fact that no weapons was recovered at the scene was understandable as of the gang of five only the appellant and the 2nd accused were apprehended at the scene.

2. The sum of RM50,000 placed by the prosecution on the value of the articles was not unreasonable as they include 8 rings and in any case was meant only as an estimate. So were the values placed on the other two charges – they were mere estimates. The Sessions Court judge was right to have treated the robbery as not of a minor nature although his use of the colloquial word "quite big time robberies" was inaccurate and inappropriate.

The Sentence – Principle To Be Followed

See *Mallal's Criminal Procedure* 5th edn 1998 – When interference with sentence justified:

> [10478]
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> It is the established principle that an appellate court should be slow to interfere or disturb a sentence passed by a court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. The mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence. (*PP v. Mohamed Nor & Ors* [1985] 2 MLJ 200. See also *Bhandulananda Jayatilake v. PP* [1982] 1 MLJ 83 (FC)).

An appellate court will not interfere unless it is satisfied that (i) the sentencing judge has made the wrong decision as to the proper factual basis for sentence; (ii) the sentencing judge has erred in appreciating the materials placed before him; (iii) the sentencing judge has passed a sentence which is wrong in principle; and (iv) the sentencing judge has imposed a sentence which is manifestly excessive. *Tan Koon Swan v. PP* [1987] 1 CLJ 511.

Was The Sentence Excessive?

The grounds of decision of the Sessions Court judge indicates that he had given due consideration to the probation report, the fact that the appellant had pleaded guilty, that when the offence was committed the appellant was only 20 years old, the plea in mitigation – all of which he had quite correctly balanced against the fact that the gang of robbers were armed in all the three cases, the amount involved in all the three robberies and above all public interest.

The maximum sentence set for an offence of gang-robbery under s. 395 of the Penal Code is 20 years. The offender is also liable to be whipped.

The sentence of six years imprisonment and five strokes of the rotan imposed by the Sessions Court judge, taking into consideration two other offences of the same nature committed by the appellant, would not under the circumstances be excessive and therefore should not be disturbed.

Irregularity In The Charge

Both parties agree that a charge of gang-robbery under s. 395 of the Penal Code need not be read with s. 34 of the Penal Code to incorporate the element of common intention. This is so because gang-robbery is defined under s. 391 as a robbery committed by five or more persons co-jointly. The incorporation of s. 34 of the Penal Code was under the circumstances superfluous.

The slight irregularity should not however affect the legality of the charge as it is clear the appellant could not have been misled by the redundant use of s. 34. The saving grace is provided under s. 156 of the Criminal Procedure Code which reads as follows:

> No error in stating a charge either the offence of the particulars required to be stated in the charge, and no omission to state the offence of those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such errors or omission.

The appeal is dismissed.